(4)

No. 06-760

In the
Supreme Court of the United States

KATHY COOPER, BETH HARRINGTON and MATTHEW HILLESHEIM,

Petitioners,

v.

THE IBM PERSONAL PENSION PLAN and IBM CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Edward Zelinsky, *The Cash Balance Controversy,* 19 Va. Tax. Rev. 683 (2000) 3

INTEREST OF THE *AMICUS*[1]

The National Employment Lawyers Association ("NELA") is a professional membership of lawyers who represent employees in labor and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 lawyers representing employees on workplace issues. These employees are, for the most part, salaried or non-union employees who do not participate in organizations such as the Chamber of Commerce or the AFL-CIO that regularly file *amicus* briefs. Accordingly, NELA has filed *amicus curiae* briefs to represent them in precedent-setting employment litigation, including the interpretation and application of the Employee Retirement Income Security Act ("ERISA"). *See, e.g., Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); and *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989).

NELA members represent participants in pension plans who have a vital interest in enforcing ERISA's protections against age-based reductions in benefit accruals. More specifically, NELA attorneys represent participants in a number of cases involving "cash balance" pension formulas and thus bring considerable experience to this brief.

For these reasons, the *amicus* respectfully requests that its views be considered in support of Petitioners.

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[1] Pursuant to Supreme Court Rule 37.6, the *amicus curiae* states that no person or entity other than the *amicus* and the undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Petitioners and Respondents have consented to the filing of this amicus brief in letters on file with the Clerk of the Court.

REASONS FOR GRANTING WRIT

Congress enacted ERISA §204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H), in 1986 to protect older employees from age-based reductions in their rate of benefit accruals. However, many cash balance formulas, including IBM's, which were adopted after the effective date of that rule accrue retirement benefits at reduced rates as employees grow older. This leaves older workers with lower benefits and thus less income to take care of themselves in retirement. The main argument against a violation is that cash balance formulas rely on the "time value of money." As shown below, these formulas actually reduce benefit accruals by compounding notional credits based on the employee's age until retirement. The Seventh Circuit's analysis conflicts with decisions on the "accrued benefit" under cash balance formulas by the Second, Ninth and Eleventh Circuits and with the Sixth and Ninth Circuits' analyses of age discrimination based on "fewer" years to retirement.

ARGUMENT

I. *Cooper* Contravenes Congress' Intention to Prohibit Age-Based Reductions in the Rate at Which Retirement Benefits Are Earned.

Cash balance formulas "imitate some of the features" of savings plans by referring to employee accounts and hypothetical credits. *Esden v. Bank of Boston*, 229 F.3d 154, 158 (2d Cir. 2000). But the retirement benefits under such formulas are determined by "projecting the cash balance forward" to retirement age and converting the result to an "annuity payable at normal retirement age." *Id.* at 159. When hypothetical credits are compounded over a greater number of years for younger employees "this will result in a larger accrual for younger employees, when measured as the increase in the benefit payable at the normal retirement age." 67 Fed. Reg. 76123, 76126 (Dec. 11, 2002); see also

Edward Zelinsky, *The Cash Balance Controversy*, 19 VA. TAX. REV. 683, 722-23 (2000).[2]

The GAO has found that as a result of cash balance formulas "older workers experience a greater loss of expected benefits than younger workers." The median reduction for workers who were age 50 at the time of a cash balance conversion was $238 per month versus $59 per month for workers who were age 30. U.S.Gov't Accounting Office, PRIVATE PENSIONS: INFORMATION ON CASH BALANCE PENSION PLANS (2005). As a result of the formula changes, older employees earn less retirement income than younger employees for the same years of employment.

A. Congress Enacted ERISA §204(b)(1)(H) to Protect Older Employees' Ability to Accrue Additional Retirement Benefits.

The purpose of the 1974 Employee Retirement Income Security Act ("ERISA") was to ensure "retirement income" for employees. See also ERISA §2(a), 29 U.S.C. §1001(a) (finding that employees are losing "anticipated retirement benefits"). ERISA was enacted after a decade of study brought on by the collapse of the Studebaker company's defined benefit pension plan. See James A. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* (Univ. of Calif. 2004) at 51-79.

In the mid-1980's, Congress became concerned that many defined benefit plans and some defined contribution

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[2] The disparity between the benefit accrual rates of younger and older employees is greatest when cash balance formulas determine retirement benefits by using notional credits equal to a fixed percentage of pay, as IBM did. Unlike IBM, 74% of cash balance formulas have "graded" pay credit schedules in which the notional credits increase with age, service, or a combination of the two. See Mellon, *2004 Survey of Cash Balance Plans–Report Highlights*, and, e.g., *Esden*, 229 F.3d at 160 (schedule ranged from 3.25% to 11.0%). Although the resulting accrual rates are specific to the schedule, graded schedules generally lessen the age-based reductions in benefit accruals, but do not eliminate them.

plans were still excluding older employees from accruing pension benefits at older ages. Employers had long argued that allowing older employees to participate in defined benefit plans was "costly."[3] Litigation to require the EEOC to invalidate these practices under the ADEA as it then existed was unsuccessful. See, e.g., *Von Aulock v. Smith*, 720 F.2d 176, 182-84 (D.C. Cir. 1983). In *Lockheed Corp. v. Spink*, 517 U.S. 882, 895-96 (1996), this Court addressed the amendments that Congress thereafter enacted to shore up ERISA's protection of older employees. *Spink* held that the rules prohibiting "age-based cessations of benefit accruals and age-based reductions in benefit accrual rates" apply to years of participation after January 1988.

The linchpin of ERISA's protection of retirement income is the "accrued benefit." ERISA distinguishes between defined benefit and defined contribution plans, ERISA §§3(34) and (35), 29 U.S.C. §§1002(34) and (35), and defines the "accrued benefit" separately for each type of plan. ERISA §§3(23)(A) and (B), 29 U.S.C. §§1002(23)(A) and (B). The protective minimum standards that Congress has enacted are based on the "accrued benefit" for each type of plan. Some minimum standards cover both plan types, but their application depends on the "accrued benefit" definition. For example, ERISA establishes minimum vesting rules for "accrued benefits." ERISA §§3(19) and 203, 29 U.S.C. §§1002(19) and 1053. But the "accrued benefit" that vests is different: In a defined benefit plan, it is an annual benefit payable at retirement. In a defined contribution plan it is the balance of the individual's account. ERISA also provides that a plan must satisfy certain "benefit accrual requirements" in ERISA §204, 29 U.S.C. §1054. That section establishes separate rules for defined benefit and defined contribution plans, and the

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[3] See H.R. Conf. Rep. 99-1012, 379; 1986 U.S.C.C.A.N. 3868, 4024; 44 Fed. Reg. 30648-49 (May 25, 1979) (citing 1967 and 1978 ADEA legislative history).

application of those rules again depends on the definition of the "accrued benefit." ERISA's rules on annuities for surviving spouses in ERISA §§205 and 206, 29 U.S.C. §§1055 and 1056, are also based on the "accrued benefit."

In *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), this Court explained that a defined contribution plan is a plan with a separate "individual account for each participant" where "the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide" in combination with the plan's investment earnings. 525 U.S. at 439. The "'accrũed benefit' for purposes of defined contribution plans means 'the balance of the individual's account.'" *Id.* at 441 n.3.

"A defined benefit plan, on the other hand, consists of a general pool of assets rather than individual dedicated accounts." 525 U.S. at 439. Participants in defined benefit plans are required to "have a right to a certain defined level of benefits, known as 'accrued benefits.' That term, for purposes of a defined benefit plan, is defined as 'the individual's accrued benefit determined under the plan [and ordinarily is] expressed in the form of an annual benefit commencing at normal retirement age.'" *Id.* at 440 (brackets in orig.). It is undisputed that IBM's cash balance plan has a "general pool of assets," with no actual individual accounts. CA App. 242.

The first "cash balance" pension formula is generally attributed to the Bank of America in 1985. See *Lyons v. Georgia-Pacific Corp.*, 221 F.3d 1235, 1238 n.2 (11th Cir. 2000), *cert. denied*, 532 U.S. 967 (2001). Almost all other cash balance formulas were adopted after the January 1, 1988 effective date of ERISA §204(b)(1)(H). Because there are no actual individual accounts or monetary contributions to individual accounts, cash balance formulas are governed by the defined benefit standards. Indeed, three

years before the *Cooper* decision, *Berger v. Xerox*, 338 F.3d 755 (7th Cir. 2003) (Posner) concluded that cash balance formulas must be regulated as defined benefit plans because, unlike a defined contribution plan, "the employee has no actual account, the employer makes no contributions to an employees account, and so there is no account balance to which interest might be added." 338 F.3d at 758. Thus, when a "hybrid" cash balance formula does not comply with the defined benefit plan rules, "for 'hybrid' read 'unlawful.'" *Id.* at 763; accord *Esden*, 229 F.3d at 159 n.6.

It is undisputed that most cash balance formulas violate ERISA §204(b)(1)(H) if the "rate of an employee's benefit accrual" is measured as the increase in the "accrued benefit" payable at retirement age. IBM and other cash balance proponents nevertheless argue that Congress might have intended the term "benefit accrual" in ERISA §204(b)(1)(H) to mean something other than the increase in the "accrued benefit." This argument is based on the point that Congress did not specifically define the term "benefit accrual" in this subsection. However, Congress used this term in adjacent subsections of ERISA §204, again without a specific definition. The context, the ordinary meaning of "benefit accrual," and Congress' and the Federal agencies' consistent use of this term all show that Congress intended for ERISA §204(b)(1)(H) to govern the increase in the "accrued benefit":

> Congress' intent was to assure a benefit measured as of normal retirement age. The value of that benefit does not change, regardless of whether the employee is younger or older than normal retirement age. What it costs to provide the benefit may change depending on an employee's age. However, that was not Congress' concern when it prohibited the diminution of the rate of accrual of the benefit expressed as an annual benefit commencing at normal retirement age.

Richards v. FleetBoston, 427 F.Supp.2d 150, 166 (D.Conn. 2006).

The policy that ERISA §204(b)(1)(H) serves is to ensure that older employees earn additional retirement benefits at the same rate as younger employees. A policy "more accommodating to the design objectives" of cash balance sponsors cannot be substituted for the statutory policy. *Esden*, 229 F.3d at 171.

B. Congress' Intent Is Confirmed by the Meaning of "Benefit Accrual," the Structure of the "Benefit Accrual Requirements" and the Legislative History.

General Dynamics Land Systems v. Cline, 540 U.S. 581, 591 (2004), recognizes that Congress intends "to protect a relatively old worker from discrimination that works to the advantage of the relatively young." Here, ERISA's text and legislative history show that Congress intended to protect relatively older employees' right to earn additional retirement benefits at an equal rate with relatively younger employees. As Judge Baer held in *In re J.P. Morgan Chase Cash Balance Litig.*, __ F.Supp.2d __, 2006 WL 3063424, *6 (S.D.N.Y. 2006), the ordinary meaning of "rate of benefit accrual" is "the rate at which an employee accumulates retirement payments." This ordinary meaning is in line with Congress' consistent use of this term. Congress first used the terms "benefit accrual" and "accrual rate" in ERISA and the 1974 Conference Report to describe the change in a participant's "accrued benefit." The Conference Report states that "In general, the accrued benefit is to be defined in terms of the benefit payable at normal retirement age," and "Each plan [will be] required to satisfy one of three accrued benefit tests (which limit the extent of 'backloading' permitted under the plan)." H.R. Conf. Rep. 93-1280, 273, 1974 U.S.C.C.A.N. 5038, 5055. The Conference Report details how one of those rules, the

"133⅓%" rule, measures the "rate of accrual" or "accrual rate" in different years based on the "accrued benefit." Conf. Rep. at 274, 1974 U.S.C.C.A.N. at 5055-56. All told, the Conference Report uses the terms "benefit accrual," "rate of accrual" and "accrual rate" in twenty places. See 1974 U.S.C.C.A.N. at 5046, 5050-52, 5055-59, 5113, 5180.

When Congress enacted ERISA §204(b)(1)(H) in 1986, it continued this usage. The 1986 Conference Report states that "Present law specifies certain requirements with respect to the rate at which benefits are accrued (i.e., earned) under a pension plan" and it describes those requirements as the "benefit accrual requirements." Conf. Rep. 99-1012, at 375, 1986 U.S.C.C.A.N. 3868, at 4020. The Conference Report illustrates the application of ERISA §204(b)(1)(H) by describing a defined benefit plan that "provides a benefit of $10 monthly per year of service." It concludes that the new rule will require older employees to earn the same "additional benefit of $10 per month." H.R. Conf. Rep. No. 99-1012, at 381, 1986 U.S.C.C.A.N. at 4026. The Conference Report also offers an example where a defined benefit plan provides a retirement benefit under a "fractional rule" formula based on highest average pay and years of participation. The Conference Report states that the new rule will not be violated where 45-year-old and 55-year-old employees "have different accrued benefits because of the different rate of benefit accrual for each year of service" but, consistent with *Cline*, the older employee enjoys a higher rate of benefit accrual than the younger employee. Conf. Rep. at 379; 1986 U.S.C.C.A.N. at 4024. Again, "accrued benefits" are unmistakably based on the "rate of benefit accrual."

Congress' intention is further shown by the context in which ERISA §204(b)(1)(H) appears. The entire statutory section is titled "Benefit Accrual Requirements." The "anti-backloading" rules for defined benefit plans are set out at the start of this section in ERISA §204(b)(1)(A)-(C), 29

U.S.C. §1054(b)(1)(A)-(C). Treasury regulations issued in 1977 specify that the "method provided by the plan for determining accrued benefits [must] satisf[y] at least one of the[se] alternative methods." Treas. Reg. 1.411(b)-1(a).

Because cash balance formulas are not based on highest average pay, the only one of ERISA's accrual rules that a cash balance formula can satisfy is the 133⅓% rule in ERISA §204(b)(1)(B). *Esden*, 229 F.3d at 167 n.18; *Register v. PNC Financial*, 2005 WL 3120268 *3 (E.D. Pa. 2005), appeal pending on other grounds in C.A. 05-5445; *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 843 (S.D. Ind. 2000). The 133⅓% rule uses the term "accrual rate" to refer to the "annual rate at which ... a participant can accrue the retirement benefits." The Treasury regulations describe how the 133⅓% rule compares the "rate of benefit accrual" or the "rate of accrual" by looking at the "accrued benefits" earned in earlier and later plan years. Treas. Reg. 1.411(b)-1(b)(2)(iii), Examples (2) and (3), and 1.411(b)-1(g).

The introductory clause to ERISA §204(b)(1)(H) connects the age discrimination rule with the preceding anti-backloading rules:

> Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph [ERISA §204(b)(1)] if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

With the connection to the "preceding subparagraphs" and the entire paragraph, it is implausible that Congress intended for the phrase "benefit accrual" to have a different meaning in this subparagraph than it has in the preceding rules.

Congress' intent is also manifest in ERISA §204(h), 29 U.S.C. §1054(h), which was enacted only six months before

ERISA §204(b)(1)(H). ERISA §204(h) requires plan administrators to provide advance notice of a significant reduction in "the rate of future benefit accrual." In issuing regulations on this rule, the Treasury Department concluded that "[t]he statutory phrase "rate of future benefit accrual" implies, on its face, that section 204(h) is limited to changes in the accrued benefits." 63 Fed. Reg. 68678, 68680 (December 14, 1998).[4]

Thus, IBM's argument that the "rate of benefit accrual" does not "necessarily" have to be interpreted consistently with ERISA's definition of the "accrued benefit" overlooks the statutory context, Congress' and the Treasury Department's consistent use of the term, and the "presumption that similar language in two labor law statutes has a similar meaning." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 61 (1987).[5] *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005), emphasized that:

> when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended the text to have the same meaning in both statutes.

Accord *Varity Corp. v. Howe*, 516 U.S. 489, 510 (1996) (ERISA §502(a)(3) authorizes individual relief against fiduciaries because identical language in §502(a)(5) authorizes such relief); *Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 244-46 (2000).

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[4] Altogether, the Treasury Department has used the terms "benefit accrual," "accrual rate" or "rate of accrual" in 34 sets of regulations related to defined benefit plans. See, e.g., Treas. Reg. 1.401(a)(4)-3(d)(1); 1.410(a)-7(e); 1.411(d)-2(b)(2); 1.411(d)-3(b)(3)(ii); 54.4980F-1, Q&A-6(b) and 8(b).

[5] See also *Deal v. United States*, 508 U.S. 129, 131-32 (1993) (if a term is susceptible to two meanings "all but one ... is ordinarily eliminated by context").

By contrast, when Congress uses terms with distinct meanings like "the rate at which amounts are allocated to the employee's account" in ERISA §204(b)(2), it is presumed that Congress is using the standard legal meaning of those terms and is drawing an intentional distinction. See *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2412 (2006) ("We normally presume that, where words differ...Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 357 (2005) ("when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another, and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism").

II. The Seventh Circuit's Decision Rests on Misguided Policy Analyses.

A. *Cooper* Rests on the Faulty Premise that Cash Balance Formulas Are "Economically Equivalent" to Defined Contribution Plans.

The *Cooper* decision never addresses Congress' use of the terms "accrual rate" and "benefit accrual" in ERISA §§204(b)(1)(B) and (h), but instead holds that the two different age discrimination tests for defined benefit and defined contribution plans in ERISA §§204(b)(1)(H) and (b)(2) "appear to say the same thing." App. 3. While forcefully worded, the *Cooper* decision ignores Congress' and the Treasury Department's consistent use of the terms "accrual rate" and "benefit accrual" and the canon that neologisms should not replace standard legal terminology.

To use the panel's metaphor, the *Cooper* decision went "off the rails" when it conflated the rules for defined benefit and defined contribution plans and ultimately substituted a neologism of "imputed" "inputs" in place of the statutory term "benefit accrual." App. 5.

NELA submits that the Second Circuit's *Esden* decision offers the sounder application of ERISA to cash balance formulas. *Esden* holds that cash balance plans are defined benefit plans which are subject to the"rigidly binary" rules on benefit accruals and the valuation of benefits in ERISA. 229 F.3d at 159 n.6; accord IRS Notice 96-8, 1996-1 C.B. 359, Sec. III.A. The sponsor of a cash balance plan is not permitted to "draft" or "contract around" the statutory requirements through "credits" to fictional accounts. 229 F.3d at 159 n.6 and 173.

Cooper is, by contrast, built on a panel's policy judgment that IBM's benefit formula should be considered "economically equivalent" to that of a defined contribution (aka "savings") plan because older and younger employees under IBM's cash balance formula receive the same hypothetical pay "credits."App. 2-6. In addition to disregarding standard principles of construction, *Cooper*'s policy analysis neglects three indisputable ways in which cash balance formulas and defined contribution plans are not "economically equivalent":

First, despite the imitation of the savings plan terminology, cash balance plans are funded as defined benefit plans: The "employee has no actual account [and] the employer makes no contributions to an actual account." *Berger*, 338 F.3d at 758. Instead, companies fund the benefits under cash balance formulas using the same "pooled" funding methods that apply to other defined benefit plans. *See Esden*, 229 F.3d at 158 n.5 ("the employer retains funding flexibility"). This is not a technical distinction because plans with cash balance formulas have

already been terminated with insufficient funds to pay the plan's benefits. *See, e.g., Burstein v. Allegheny Fdn. Ret. Acct. Plan*, 334 F.3d 365, 370 and 375 (3d Cir. 2003). In defined contribution plans, by contrast, employers are required to make contributions in full each year to a separate individual account, thereby ensuring against underfunding. App.10 (a "defined contribution plan entails fully funded individual accounts").

Second, even when the notional credits under cash balance formulas are not undercut by funding deficiencies, they are often nullified by contractual features, such as "wear-away" provisions under which older employees do not actually earn any additional retirement benefits after the conversion of the plan's formula. See *Richards*, 427 F.Supp.2d at 155 (wear-aways cause employees "to work for many years following [a conversion] without actually accruing any new benefits, despite the existence of a hypothetical cash balance account that show[s] benefits being added each quarter").[6] The individual account structure required for defined contribution plans does not permit contractual features like "wear-aways" that have the effect of nullifying the monetary allocations to an individual's account.

Third, cash balance formulas are unlike defined contribution plans because employees do not share in the plan's actual investment returns, as in a defined contribution plan, but receive whatever notional credits are prescribed by the plan's terms. In *Miller v. Xerox*, 447 F.3d 728, 735 (2006), the Ninth Circuit found that hypothetical "interest credits are defined benefit entitlements specified

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[6] Accord 64 Fed. Reg. 56578, 56579 (Oct. 13, 1999) (as a result of "wear-away" effects, "employees who had already earned benefits may not earn additional retirement benefits for varying periods of time after the conversion"; this effect "continues until an employee's benefit under the ongoing cash balance formula 'catches up' with the employee's protected benefit").

by the plan terms, and are not analogous to the investment growth of a defined contribution plan." The spread between the actual interest credits and actual investment returns permits employers to "credit" interest at one rate while actually earning higher rates. *Esden*, 229 F.3d at 158 n.5 ("the investment experience in excess of the promised interest credits" "belongs to the employer"). Defined contribution plans are not allowed to provide artificially low interest rates when a plan actually earns higher returns.

B. Contrary to *Cooper*'s Assertion that "Nothing Depends on Age," IBM's Accrual Rates Are Reduced by Compounding Notional Credits by the Number of Years Until Retirement, Which Is a "Direct Proxy" for Age.

Cooper justifies its result not with the statutory text, but by attributing the lower benefit accruals for older workers to the "time value of money" or "power of compound interest." App.2-8. *Cooper* asserts that "Nothing depends on age," *id.* at 7, while ignoring the fact that the value of a participant's retirement benefit under IBM's cash balance formula is mathematically determined by compounding notional credits by the number of years the participant has until retirement age. CA App. 381.

The number of years participants have until retirement age is a "direct proxy" for their age. *Erie County Retirees Ass'n v. County of Erie,* 220 F.3d 193, 211 (3d Cir. 2000), *cert. denied*, 532 U.S. 913 (2001). A "reasonable factor other than age" cannot be one that uses age, directly or indirectly, as a "limiting criterion." 29 C.F.R. §1625.7(c). Basing benefits on "potential years" years to retirement is a proxy for age because it means that fewer "constructive years" are

given older workers than younger workers. *EEOC Compliance Manual*, Sec. 3.[7]

The Sixth and the Ninth Circuits have held that providing lower monthly benefits based on older employees' having "fewer" years to retirement is age discrimination. In *Arnett v. CalPERS*, 179 F.3d 690, 695 (9th Cir. 1999),[8] the State of California determined disability benefits with a formula that multiplied 2% of pay by the participant's "potential years of service" to retirement. *Arnett* held that the "practical application" of this formula "leaves no doubt that age at hire ... is the sole basis for lower benefits." In *EEOC v. Jefferson Co.*, 467 F.3d 571 (6th Cir. 2006) (*en banc*), the Kentucky Retirement System ("KRS") offered "lower" disability retirement benefits to employees with "fewer" years to retirement. 467 F.3d at 572 and 586. The Sixth Circuit ruled that the ADEA was violated because the KRS "calculates disability-retirement benefits in such a way that an older employee who is eligible to receive disability benefits receives fewer benefits–in the form of lower monthly payments–than a younger disabled employee." *Id.* at 572. Quoting *Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993), the Sixth Circuit concluded that the ADEA is violated if "an employee's age...'actually play[s] a role in' and has 'a determinative influence on the outcome' of the amount" of an employee's monthly benefit. *Id.* at 579-80.

Cooper's analysis ignores not only how the reduced rates of benefit accrual are "perfectly correlated" with age under IBM's formula, *Richards*, 427 F.Supp.2d at 168, but also the

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[7] Although no final regulations on ERISA §204(b)(1)(H) have ever been issued, three sets of proposed regulations confirm that age cannot be a limiting factor in determining retirement benefits. *See* 52 Fed. Reg. 45360, 45362 (Nov. 27, 1987); 53 Fed. Reg. 11876, 11880 (Apr. 11, 1988); and 67 Fed. Reg. 76123, 76124 and 76133 (Dec. 11, 2002).

[8] *Arnett* was vacated, 528 U.S. 1111 (2000), because of this Court's decision that public employees cannot sue State governments. But the EEOC refiled the suit and obtained the largest recovery in its history.

fact that ERISA's regulation of defined benefit plans already uses the "time value of money" for a different purpose. ERISA §§204(c)(3) and 205(g)(3), 29 U.S.C. §§1054(c)(3) and 1055(g)(3), provide that if retirement benefits are distributed in a lump sum on a separation from service, the retirement benefit is discounted based on the number of years to retirement age. As a result, younger employees receive lower lump sums on a separation from service because the "present value" of, for example, a $100 per month retirement benefit is lower for a 30 year old than for a 60 year old. However, if a younger employee rolls the distribution over into IRA or 401(k) account, it may grow to the same retirement benefit through the "power of compound interest." The *Cooper* decision posits that defined benefit plans should be considered "age-neutral" only if older and younger employees receive the same distributions on a separation from service. See App. 6 and 11-12. But this is fundamentally inconsistent with ERISA's regulation of lump sum distributions.

Cooper's additional rationales suffer from the same types of flaws. *Cooper* justifies the assertion that "Nothing depends on age" by describing how an age 65 employee can "wait" 40 more years to draw his or her benefits to receive an equal amount of retirement income for a year of participation as an age 25 employee. App.7-8. The decision simply ignores that an age 65 employee who "waits" 40 years is age 105. *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) holds that it is "of little comfort" to the victims that there are some exceptions to the discrimination. It is of less "comfort" for an exception to depend on an individual retiring at age 105.

The *Cooper* decision also misunderstands how the Treasury Department computes the "rate of benefit accrual" by offering this example:

> Consider a formula that adds $500 to annual pension benefits for every year worked.... [O]n the plaintiffs' understanding [this] would be a form of discrimination against the old, because the $500 is a smaller 'rate of benefit accrual' as time passes. Someone who worked two years would get a '100% rate of increase' in his second year (his annual benefits on retirement would jump from $500 to $1,000), while someone who works 20 years receives only a 2.56% growth (from $19,500 to $20,000) in Year 20.

App. 5-6. The "rate of increase" or "growth" percentages in the last sentence show the panel's confusion. Under a unit benefit formula (such as in this example), the "rate of benefit accrual" is the dollar amount of the increase in the retirement benefit. Treas. Reg. 1.411(b)-1(g) ("rate of benefit accrual" for a plan providing $96 per year of service for the first 25 years "is equal in each of the first 25 years of service"). In a plan that bases benefits on a "percentage of a participant's average compensation," the "accrual rate" is the increase in benefits as a percentage of pay. Treas. Reg. 1.411(b)-1(b)(2)(iii) and 1.401(a)(4)-3(d)(1). Neither the Treasury Department nor Congress has ever computed an "accrual rate" in the manner *Cooper* proposes. The "understanding" attributed to the plaintiffs is also wrong. Their position is that ERISA requires equal dollar or percentage-of-pay increases in accrued benefits: In the example, "Someone who worked two years" and "someone who works 20 years" receive the same $500 benefit accrual.

Cooper finally charges that traditional defined benefit formulas that make the "annual pension on retirement...a function of closing salary ... multiplied by the number of years of service" "favor[] older workers" because "wages rise with seniority." App. 11. The opinion suggests that IBM's conversion to a cash balance formula merely removed the "extra benefits to the old." App. 12. In fact, defined benefit formulas based on "closing salary" favor longer-service

workers whose salaries have risen, not older employees as such. An employee who works from age 20 to age 35 is more likely to gain more from a formula that uses "closing salary" than an employee who works from age 60 to 65. In *Hazen Paper*, 507 U.S. at 611, this Court recognized that "age and years of service are analytically distinct ... and thus it is incorrect to say that a decision based on years of service is necessarily 'age-based.'" ERISA §204(b)(1)(H)(ii) further recognizes this distinction by permitting companies to limit the "amount of benefits" or the number of years of service taken into account under such formulas without violating the prohibition on age-based cessations or reductions in accruals. The *Cooper* decision ignores these rules in order to assert that traditional defined benefit formulas favor older workers, while denying the age discrimination under cash balance formulas that is caused by their direct use of age until retirement as the basis for accruing benefits.

Ultimately, the *Cooper* decision overlooks that the court's mission "is to apply the text, not to improve upon it." *Pavelic & LeFlore v. Marvel Enter.*, 493 U.S. 120, 126 (1989). Here, the "dispute is not over what a 'better' regulatory regime, more accommodating to the design objectives of cash balance plans might look like; the dispute is over how to apply the existing regulations to [the] Plan." *Esden*, 229 F.3d at 171.

III. *Cooper* Is in Conflict with *Esden* in the Second Circuit and with the *EEOC v. Jefferson Co.*, *Arnett*, *Miller* and *Lyons* Decisions.

NELA respectfully submits that this Court should grant *certiorari* to address the conflicts between *Cooper* and the Second Circuit's *Esden* decision, the Ninth Circuit's decision in *Miller v. Xerox*, 464 F.3d 871 and the Eleventh Circuit's decision in *Lyons*, 221 F.3d 1235. *Cooper* dismisses the fundamental distinction between defined benefit and defined contribution plans as "irrelevant" or "appear[ing] to

say the same thing." App.3 and 9. It further holds that "Nothing in either ERISA or the IBM plan requires 40 years of interest to be credited to the account as soon as the younger worker earns wages." App. 8.

In *Esden*, the Second Circuit held that a cash balance plan "is a defined benefit plan, not a defined contribution plan" and because of this, the benefits attributed to interest credits "must be valued in terms of the annuity that it will yield at normal retirement age." 229 F.3d at 163-65. Accord *Lyons*, 221 F.3d at 1235 (the "accrued benefit" under a cash balance plan is "calculated under the Plan by projecting forward the amount in [the] hypothetical account using the interest credit rates specified in the Plan"); *Miller*, 464 F.3d at 875 (a "hybrid" plan's "promise of a defined benefit triggered ERISA's defined benefit plan rules, which require that any lump-sum substitute for an accrued pension benefit be the actuarial equivalent of that benefit"); IRS Notice 96-8, 1996-1 C.B. 359, Sec. III.B.1 ("an employee's accrued benefit as of any date before attainment of normal retirement age is based on the employee's hypothetical account balance as of normal retirement age, including future interest credits to that age"). These decisions and the IRS's guidance, which is entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), are in conflict with *Cooper*'s holding that the distinction between defined benefit plans and defined contribution plans is "irrelevant" and that interest credits to retirement are not part of a participant's "accrued benefits."

Even after the *Cooper* decision, three district courts in the Second Circuit have applied *Esden* in holding that cash balance formulas violate ERISA §204(b)(1)(H) when they offer lower benefit accruals to older employees. See *In re Citigroup Pension Plan ERISA Litig.*, __ F.Supp.2d __, 2006 WL 3613691 *11-13 (S.D.N.Y. 2006); *In re J.P. Morgan*

Chase, 2006 WL 3063424, *6-8; *Richards v. FleetBoston*, 427 F.Supp.2d at 163-64 and 2006 WL 3000768 *2.

Cooper also conflicts with the Ninth Circuit's *Arnett* decision, 179 F.3d at 695, and the Sixth Circuit's *en banc* decision in *EEOC v. Jefferson Co.*, 467 F.3d at 579-80. *Cooper* holds that the fact that "younger workers have (statistically) more time left before retirement, and thus a greater opportunity to earn interest on each year's retirement savings" is attributable to the "power of compound interest," and not age. App. 5-8. By contrast, *Arnett* and *Miller* hold that the "fewer" years that older employees have until retirement is ineluctably based on age and cannot be used as a basis for reducing the monthly benefits they earn.

Finally, this Court should grant certiorari because appeals involving age discrimination in cash balance formulas are already pending in four other circuits: *Register v. PNC Finan.* (3rd Cir., 05-5445) (orally argued December 14, 2006), *Hirt v. Equitable* (2nd Cir., 06-4757), *Drutis v. Quebecor* (6th Cir., 06-6380), and *Hurlic v. So. Cal. Gas* (9th Cir., 06-55599). These appeals, and 14 other district court cases, emphasize the importance of resolving whether ERISA §204(b)(1)(H) protects the accrual of retirement benefits, or notional credits to accounts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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